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PROCEEDINGS AND ORDERS

DATE: 107/05/881

CASE NRR: [87106977] [CSY1

CASE STATUS: [

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SHORT TITLE: [Nicks Harry

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VERSUS [Alabama

1 DATE DOCKETED: 10512881

PAGE: 1011

DATE	NOTE	PROCEEDINGS & ORDERS
Apr 4 1988	Application for extension of time to file petition and order granting same until May 12 1988 (Kennedy April 4 1988).	
May 12 1988	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.	
Jun 13 1988	Brief of respondent Alabama in opposition filed.	
Jun 15 1988	DISTRIBUTED. June 29 1988	
Jun 29 1988	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)	

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EDITOR'S NOTE

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87-6977

ORIGINAL

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

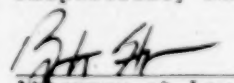
HARRY NICKS,
Petitioner,
vs.
STATE OF ALABAMA,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, HARRY NICKS, who is now held on death row at Holman State Prison in Atmore, Alabama asks leave to file the accompanying Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

Petitioner submits the accompanying affidavit in support of his motion and further submits that he was granted leave to proceed in forma pauperis at trial and on appeal due to his indigency.

Respectfully submitted,


Attorney at Law

BRYAN A. STEVENSON
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

COUNSEL FOR PETITIONER

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87-6977

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

HARRY NICKS,
Petitioner,
vs.
STATE OF ALABAMA,
Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Harry Nicks being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress. I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am not presently employed.

2. I have not received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source.

3. Do you own any cash or checking or savings account?

Yes _____ No ☒

If yes, please state the total value _____.

4. I currently own no real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

none

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

MR. HARRY NICKS Z-444

Signed and sworn to this 5/16/88 day of May, 1988.

87-6977
ORIGINAL

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

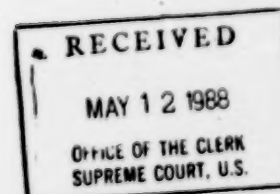
October Term, 1987

HARRY NICKS,
Petitioner,
vs.
STATE OF ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRYAN A. STEVENSON
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COUNSEL FOR PETITIONER



QUESTIONS PRESENTED

1. DOES THE ADMISSION OF UNADJUDICATED COLLATERAL ACTS EVIDENCE AT THE PENALTY PHASE OF A CAPITAL TRIAL VIOLATE THE EVIDENTIARY REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS?
2. DOES THE EIGHTH AMENDMENT AND THIS COURT'S DECISION IN CALDWELL V. MISSISSIPPI PROHIBIT A PROSECUTOR FROM INFORMING THE JURY THAT THE JUDGE WILL DECIDE THE APPROPRIATE SENTENCE AND FROM STRESSING THE PRELIMINARY AND ADVISORY NATURE OF A CAPITAL JURY'S SENTENCING DETERMINATION?

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No. _____
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

HARRY NICKS,)
)
Petitioner,)
)
vs.)
)
STATE OF ALABAMA,)
)
Respondent.)

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

Petitioner Harry Nicks prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama in this case.

Opinion Below

The judgement of the Alabama Supreme Court was rendered on February 12, 1988, and is attached as Appendix A hereto. The opinion of the Alabama Court of Criminal Appeals was issued on January 27, 1987, and is attached as Appendix B hereto.

Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States. After filing an application for an extension of time in which to file this petition for writ of certiorari, this Court, per Justice Kennedy, issued an order extending the time thirty (30) days in which a

timely petition could be filed to May 12, 1988. (See Appendix C).

Constitutional and Statutory Provisions Involved

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

The Fourteenth Amendment provides:

"[N]or shall any state deprive any person of life, liberty or property, without due process of law; nor shall any state deprive any person within its jurisdiction the equal protection of the laws.

The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . .

STATEMENT OF THE CASE

On March 5, 1983, the Bessemer Pawn Shop in Bessemer, Alabama was robbed. Both of the shop operators working at the shop were shot and one operator, Robert Back, died of a gunshot wound to the head. The other shop worker, Debra Love, survived and testified at trial that Petitioner robbed the pawn shop and killed Robert Back. Despite Love's in-court identification of Petitioner her initial physical descriptions of the assailant did not match Petitioner's physical description and she repeatedly failed to identify petitioner as the assailant in several identification line-ups.

Harry Nicks, petitioner, pleaded not guilty to this offense but was convicted and sentenced to death in part because of the admission of an unadjudicated act he was alleged to have committed by a state witness, Guicy Horne. The collateral act--- the March 15, 1983 robbery of the Seymour Jewelry Store in Bessemer, Alabama was admitted and argued before the jury at both the guilt/innocence and sentencing phases of the trial over petitioner's objection.

Evidence concerning petitioner's involvement in the unadjudicated robbery was inflammatory and unreliable. Two witnesses directly testified concerning events at the jewelry store, and a policeman testified as to his investigation at the store. (R. 434-453; 484-492). Guicy Horne who testified that he desired to collect a \$10,000 money reward offered for information concerning capture of any suspect in the pawn shop case, is the only witness to allege petitioner's involvement in the jewelry store robbery. Horne who was subsequently convicted for the jewelry store robbery and given a lesser sentence in exchange for his testimony in petitioner's case, testified that Nicks participated in the jewelry store robbery. However, his trial testimony directly contradicted his previous statements to the police, earlier statements and other witnesses to the jewelry store robbery. (R. 496-564).

Notwithstanding these contradictions, the fact that petitioner was never indicted or prosecuted for any involvement in the jewelry store robbery, and despite the fact that the trial judge only admitted this evidence at the guilt phase "for the limited purpose of showing scheme, plan, method of operation, and the identity of the defendant and for that purpose only" (R. 715), this unadjudicated collateral act was submitted and argued to the jury for consideration at the penalty phase. (R. 732, 774).

The prosecutor also argued the following at the penalty phase of petitioner's trial:

The opinion, which you will come to a conclusion when you go back and deliberate -- Let me say this, it will be only an advisory opinion. The law provides for you to present this to the Court for their consideration. The ultimate decisions rests with Judge Reynolds. He will be the one to take whatever ruling that you send out and decide whether it will be life without parole or death by electrocution in the electric chair.

So with that in mind, I would like to comment briefly on two of the witnesses that the defense has presented to you in mitigating circumstances.

(R. 787-788). After impermissibly speculating about Petitioner's opportunity and ability to kill prison guards and others if given a life sentence, (R. 790), the prosecutor concluded: "Return an opinion, an advisory opinion, of death by electrocution in the electric chair." (R. 792). All of these comments came after the prosecutor had repeatedly stressed the advisory nature of the jury's sentencing recommendation in his opening argument. (R. 732-740).

In instructing the jury the trial judge informed jurors that they would be provided "two verdict forms -- I call them verdict forms -- but they are, in fact, really an advisory verdict form." (R. 798).

The jury returned a sentencing verdict recommending death 10-2. Two jurors voted that petitioner should receive a life sentence without parole.¹

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

A. The Inadmissible Unadjudicated Collateral Acts

Throughout the course of the trial and at the sentencing phase of the trial, evidence of petitioner's alleged participation in a collateral act was admitted and argued before the jury, over petitioner's objection. Petitioner filed a detailed motion in limine to exclude any and all uses of this evidence throughout the entire course of the trial, asking the trial court "to instruct, direct, and order the district attorney and his witnesses not to mention, refer to, interrogate concerning, argue or mention in any way either directly or indirectly throughout the course of the trial the fact that they believe or can identify the defendant as to having participated

1. Under Alabama law, a minimum of ten jurors recommending death is needed for a jury recommendation of the death penalty. A jury recommendation with fewer than ten jurors recommending death results in a hung jury and a new sentencing hearing. A recommendation of life without parole by a majority of jurors results in a jury recommendation of life without parole. Ala. Code §13A-5-46.

in an alleged robbery of Seymour Jewelry Company on March 15, 1983." The motion was summarily denied by the trial court. (R. 179).

The issue was raised on direct appeal and rejected by the Alabama Court of Criminal Appeals and the Alabama Supreme Court.

B. The Prosecutor's Improper Closing Argument

The question of the application of this court's holding in Caldwell v. Mississippi, 472 U.S. 320 (1985), to a capital sentencing scheme that gives a trial judge final sentencing authority was not at issue until after Caldwell was decided in 1985. Petitioner's trial occurred on May 25, 1984 before the Caldwell holding had been articulated by this Court. The Alabama Court of Criminal Appeals and the Alabama Supreme Court however, had the benefit of this Court's ruling when Petitioner's case was considered on appeal.

In reviewing petitioner's case, the Court of Criminal Appeals states:

We have examined the instant record for any plain error, whether or not brought to our attention or the attention of the trial court. We have found no "plain error or defect in the proceedings," either in the guilt phase or in the sentencing phase of the trial.

Nicks v. State, Slip Op. at 29 (Ala.Cr.App. 1987). The Alabama Court of Criminal Appeals therefore clearly considered the prosecutor's argument to the jury that the jury's sentencing determination is merely an "advisory opinion" and the judge is responsible for the sentencing decision. Since the Alabama Court of Criminal Appeals has made clear its view that such an argument does not violate this Court's holding in Caldwell or the Eighth Amendment, see, Hooks v. State, ___ So.2d ___ (Ala.Cr.App. 1987); Martin v. State, ___ So.2d ___ (Ala.Cr.App. 1988), no error was found on this issue in petitioner's case.

REASONS FOR GRANTING THE WRIT

I. THE INTRODUCTION OF UNADJUDICATED COLLATERAL ACTS IN THE PENALTY PHASE OF A CAPITAL TRIAL VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

Despite the constitutionally-prescribed evidentiary limitations for capital sentencing proceedings, the trial court below allowed introduction and argument of an unadjudicated collateral act at petitioner's sentencing hearing. At the guilt-phase, the state's witness, Guicy Horn, was allowed to testify about the March 13, 1983 robbery of a local jewelry company. Horn alleged that petitioner participated in the earlier robbery although petitioner was never charged or indicted for that offense. Evidence of petitioner's involvement in this earlier robbery was wholly uncorroborated and based entirely upon the testimony of a self-interested witness who received leniency for testifying against petitioner. (R. 468, 483, 528). Despite the fact that the evidence was allegedly admissible "for the limited purpose of showing scheme, plan, method of operation, and the identity of the defendant and for that purpose only" (R. 715), the State was permitted to argue this unadjudicated collateral act at the penalty phase of petitioner's trial. (R. 732, 774).

Arguing unadjudicated collateral acts at the sentencing phase tainted the imposition of the death penalty. Petitioner contends that this evidence was inadmissible for sentencing because it was irrelevant to proof of any statutory aggravating circumstance under Alabama law. The trial judge and sentencing jury's reliance upon this irrelevant and unreliable evidence undermined the reliability of the sentencing determination and deprived petitioner of a fair sentencing hearing in violation of the eighth and fourteenth amendments.

A. There is Conflict Among the Lower Courts Concerning the Admissibility of Unadjudicated Collateral Acts Evidence

The questions concerning the competence and admissibility of collateral, unadjudicated crimes evidence at a capital sentencing hearing are ripe for resolution by this Court. This Court has recently declined to grant certiorari in similar cases, see Devier v. Kemp, ___ U.S. ___, 108 S.Ct. 338, 98 L.Ed.2d 365, (1987); Williams v. Lynaugh, 484 U.S. ___, 108 S.Ct. 311 (1987), but this critical issue continues to recur and should be addressed by this Court.

As Justices Marshall and Brennan emphasize in dissent in Williams v. Lynaugh, collateral act evidence is incompetent at a capital sentencing hearing because "the use of such evidence at sentencing is at tension with the fundamental principle that a person not be punished for a crime that the state has not shown he committed. In the context of capital sentencing, this tension becomes irreconcilable." 108 S.Ct. at 313 (Marshall and Brennan, JJ., dissenting from denial of certiorari).

Because "death is different" it is vitally important to a capital defendant and the community that a decision to impose a death sentence be and appear to be based on reason rather than caprice or emotion. Gardner v. Florida, 430 U.S. 349, 357-358 (1977) (opinion of Stevens, J.). This Court has spoken of a heightened need for reliability in the determination that death is the appropriate punishment in a specific case, Woodson v. North Carolina, 428 U.S. 280, 305 (1976).² Thus, under the eighth and fourteenth amendment's evidentiary requirements, a

² Even in the noncapital context, when introduction of incompetent evidence places "the factual circumstances of the [defendant's] background in a dramatically different light at the sentencing proceeding," resentencing is required. United States v. Tucker, 404 U.S. 443, 447-48 (1972). See also Burgett v. Texas, 389 U.S. 109, 115 (1967) (conviction vacated because "admission of a prior criminal conviction which is unconstitutional" "is inherently prejudicial."); Townsend v. Burke, 334 U.S. 736, 741 (1948) (invalidating conviction and sentence where the defendant was "sentenced on the basis of assumptions concerning his criminal record which were materially untrue.")

death sentence is invalid if a sentencing jury is exposed to (1) irrelevant or inflammatory evidence, Booth v. Maryland, 107 S.Ct. 2529 (1987); or (2) evidence which is irrelevant to proof of a statutory aggravating circumstance. See Zant v. Stephens, 462 U.S. 862 (1983).

There is presently conflict between the rulings of the various state courts on this issue. Many states prohibit the use of collateral act evidence to prove a statutory aggravating factor at the sentencing phase of a capital trial.³ State v. Bobo, 727 S.W. 2d 945, 952-53 (Tenn. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 204 (1987); State v. Bartholomew, 101 Wash.2d 631, 640-642, 683 P.2d 1079, 1085-866 (Wash. 1984) (en banc), vacated [on other grounds], 4763 U.S.) 1203 (1983) (check cite); State v. McCormick, 272 Ind. 272, 277-78, 397 N.E. 2d 276, 180 (Ind. 1979); Scott v. Maryland, 465 A.2d 1126 (Md. 1983); Perry v. State, 395 So.2d 170, 174 (Fla. 1980).

Despite this substantial authority, other jurisdictions allow introduction of collateral act evidence at capital sentencing. The Fifth Circuit has allowed admission of such evidence. Williams v. Lynaugh, 814 F.2d 205 (5th Cir. 1987), cert. denied 108 S.Ct. 311 (1988). California employs a reasonable doubt standard for admission of collateral act evidence at a capital sentencing hearing. People v. Easley, 33 Cal. 3d 65, 187 Cal.Rptr. 745, 758-61, 654 P.2d 1272, 1286-88 (Cal. 1982), vacated on other grounds, 334 Cal.3d 813 (Cal.

³ A defendant is unnecessarily prejudiced by the admission of unadjudicated crime evidence that does not substantiate any statutory aggravating circumstance, see Zant, supra. The collateral act evidence used against petitioner did not substantiate any aggravating circumstance and served only to prejudice the jury in favor of a death sentence.

1983).⁴ Collateral act evidence is admissible in Texas, Georgia and Nevada merely if the trial court deems it relevant to the sentencing proceedings. Milton v. State, 566 S.W.2d 824, 827 (Tex.Crim.App. 1980) (en banc), cert. denied, 451 U.S. 1031 (1981); Fair v. State, 245 Ga. 868, 870-71, 286 S.E.2d 316, 319-20 (Ga. 1980), cert. denied, 449 U.S. 986 (1980). Crump v. State, 716 P.2d 1387, 1388, 89 (Nev. 1986), cert. denied, 107 S.Ct. 242 (1986). South Carolina allows admission of such evidence to show characteristics of the defendant. State v. Skipper, 285 S.C. 42, 48-49, 328 S.E.2d 58, 62 (S.C. 1985) rev'd on other grounds sub nom. Skipper v. South Carolina, 476 U.S. 1 (1986).

As Justices Marshall and Brennan note, "it appears beyond dispute that the issue is both significant and recurring, and one on which the lower courts are in disarray." Williams, 108 S.Ct. at 314. Given the confusion surrounding this common issue in capital sentencing, which appears before this Court yet again, this Court should grant certiorari to clarify the confusion and provide necessary guidance to the lower courts.

⁴ Such a standard, however, is dubious. As Justice Marshall correctly notes in dissent in Williams, application of the reasonable doubt standard, concedes that the Constitution requires a jury to determine that the alleged conduct actually occurred. Consistent with due process, the state has not proven that a criminal act has occurred until a charge is proven by a reasonable doubt at trial. In Re Winship, 397 U.S. 358 (1970). The state cannot sanction a defendant until that burden is met. Because the reasonable doubt standard is the precise standard demanded at trial, the state bears an impossible burden of demonstrating how it could apply a reasonable doubt standard at the capital sentencing proceeding without affording a defendant the panoply of constitutional rights which attach at trial -- limitations on use of evidence, cross-examination of witnesses, introduction of defense witnesses to disprove the charge.

In Petitioner's case, evidence of the collateral act was introduced through one witness, a self-interested, contradictory witness. Petitioner had no opportunity to, and was under no obligation to, contest this charge. Otherwise, every trial with alleged collateral act evidence becomes a full-scale trial within a full scale trial -- for every alleged collateral act. Surely, the trial court would never have allowed such a collateral trial.

B. A Sentencing Jury's Reliance Upon An Unadjudicated Crime Creates The Same Prejudice and Arbitrariness As Reliance Upon An Invalid Prior Conviction

The validity of a death sentence based upon the introduction of evidence of unadjudicated collateral acts mirrors the validity of a death sentence based upon an invalid prior conviction. In Johnson v. Mississippi, 511 So.2d 1333 (Miss. 1987), cert. granted, 87-5468, 108 S.Ct. 693 (1988), this Court is currently addressing the validity of a death sentence based upon a prior criminal conviction subsequently overturned.

The introduction of unadjudicated crimes injects into the sentencing decision the same type of prejudice as introduction of an invalid conviction. In the case of an invalid conviction, a criminal charge has failed to withstand the rigor of due process; in the case of an unadjudicated crime, the charge has yet to be subjected to the rigors of due process. In both cases however, a jury's sentencing decision is prejudicially informed by a criminal charge unstamped with the imprimatur of due process. Consequently, no death sentence should stand if imposed partially as punishment for either an invalid conviction or an unadjudicated collateral act.

II. PROSECUTORIAL ARGUMENT STRESSING THE ADVISORY AND PRELIMINARY NATURE OF THE JURY'S SENTENCE VIOLATES CALDWELL AND THE EIGHTH AMENDMENT

There presently exists tremendous confusion and considerable conflict between various state courts and federal courts concerning the application of the Eighth Amendment and this Court's decision in Caldwell v. Mississippi, to a prosecutor's argument which stresses the preliminary and advisory nature of a jury's sentencing determination and informs the jury that the trial judge is the ultimate sentencing authority.

Petitioner contends that the Prosecutor's argument in this case which stressed that the jury's sentence was an "advisory opinion" and informed the jury that the judge would determine

which sentence is appropriate, reinforced by the judge's instruction, violated his Eighth Amendment right to a reliable determination that death is the appropriate punishment in his specific case. This Court in Caldwell held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell, 105 S.Ct. at 2639.

Since this Court's ruling in Caldwell, considerable conflict has emerged concerning the application of the Caldwell holding to states, such as Alabama, where the jury's capital sentencing determination is not binding, and where the judge has ultimate sentencing authority.

A. An Accurate and Arguably Nonmisleading Argument May Still Violate the Eighth Amendment

Under Alabama law, a capital defendant has a right to have a jury render a sentencing verdict. Ala. Code §13A-5-46. Although the sentencing verdict is "advisory" and "not binding on the court", it must be considered by the judge who has final sentencing authority and plays an important role in deciding whether a capital defendant lives or dies. See Ala. Code §13A-5-47(e). Alabama law provides:

The decision of the jury to return an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of jurors. The decision of the jury to recommend a sentence of death must be based on a vote of at least ten jurors. The verdict of the jury must be in writing and must specify the vote.

If the jury is unable to reach an advisory verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentencing hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case.

Ala. Code §13A-5-46(f)(g). The Alabama Supreme Court has frequently emphasized the significant role of the jury in the capital sentencing process in Alabama. The lower court has expressly construed Alabama's capital statute to require that jury sentencing hearings be errorless and not undermined by improper instructions or arguments and stressed the significance of the jury's sentencing verdict. See Ex Parte: Roy Williams, ___ So.2d ___, (Ala. 1987); Giles v. State, ___ So.2d ___ (Ala. 1987).

Notwithstanding the critical role played by sentencing juries in Alabama capital cases, the Alabama appellate court has ruled that an argument and instruction to the jury that its sentencing determination is merely advisory, and that the trial judge will make the ultimate sentencing decision is constitutionally permissible. The Alabama Court of Criminal Appeals has concluded because such statements accurately state the law they do not violate this Court's ruling in Caldwell. Hooks v. State, ___ So.2d ___ (Ala.Cr.App. 1987); Martin v. State, ___ So.2d ___ (Ala.Cr.App. 1988).

Some state courts have similarly ruled that arguments or instructions informing the jury that their verdict is "advisory" or a "recommendation" do not violate the Eighth Amendment because they accurately state the law. See e.g., Roberts v. State, 709 S.W.2d 857 (Mo. 1986); People v. Perez, 483 N.E. 250 (Ill. 1985); Matthews v. Commonwealth, 709 S.W.2d 414 (Ky. 1985). Other courts however have concluded that such instructions nevertheless violate this Court's holding in Caldwell. Most significantly, the Eleventh Circuit Court of Appeals has held that argument which informs jurors that their sentencing is merely advisory and a "recommendation" violates Caldwell and the Eighth Amendment. See Mann v. Dugger, ___ F.2d ___ (11th Cir. 1988). The Court ruled similarly in Adams v. Wainwright 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987),

which this court recently granted certiorari to review. Adams v. Dugger, 56 U.S.L.W. 3608 (U.S. Mar. 7, 1988).

The question of whether argument stressing the preliminary nature of a jury's sentencing determination can so minimize the the jury's sense of responsibility as to unconstitutionally increase the likelihood of a death sentence is an important one. Three justices of this Court recently dissented from a denial of a petition for writ of certiorari that presented this question. Steffen v. Ohio, No. 87-5823, 42 Cr.L.Rptr. 4168 (March 2, 1988). The conflict that presently exists concerning this issue will continue until this Court addresses these questions left unresolved by Caldwell. If this Court does not definitively resolve this issue in its review in Adams v. Dugger, it should grant certiorari in Petitioner's case and conclude that the Eighth Amendment prohibits argument to a capital jury which stresses to the jury that its sentencing determination is preliminary and thereby increases the likelihood for a death sentence.

B. The Prosecutor's Argument Was Inaccurate and Misleading

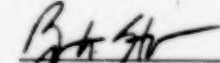
In this case, the prosecutor repeatedly stressed to the jury that its sentence was an advisory opinion. While Alabama's statute makes reference to the jury's sentencing determination as an "advisory verdict" and a "recommendation", informing a jury that its role is to render a mere "opinion" is both inaccurate and misleading. The term "verdict" carries great weight and responsibility in criminal proceedings and conveys to jurors an appropriate obligation to diligently deliberate and speak the truth. Semantically and legally, use of the word "opinion" suggests to the jury that its sentencing judgment has no legal effect at all and clearly contributes to a juror's perception that his or her deliberation of a defendant's sentence is gratuitous and undeterminative. It is precisely this demeaned sense of responsibility that this Court concluded in Caldwell is unacceptable in a capital sentencing proceeding and violative of the

Eighth Amendment.

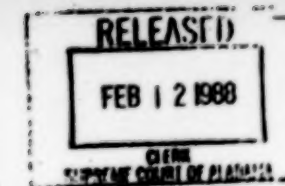
CONCLUSION

This Court should grant this petition for writ of certiorari to the Supreme Court of Alabama.

Respectfully submitted,


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Counsel for Petitioner



APPENDIX A

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1987-88

Ex parte Harry Nicks

86-838

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Harry Nicks
v.
State of Alabama)

PER CURIAM.

Pursuant to Rule 39(c), A.R.App.P., we granted the defendant's petition to review the judgment of the Court of Criminal Appeals affirming the defendant's conviction and sentence of death. Nicks v. State, [5 Div, 556, Jan. 27, 1987] ___ So.2d ___ (Ala.Crim.App. 1987). After carefully and thoroughly considering the record of trial, the Court of Criminal Appeals' opinion, and the briefs and arguments of the parties, we find no basis for reversal of the judgment of the Court of Criminal Appeals.

AFFIRMED.

All the Justices concur.

JAN 27 1987

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1986-87

6 Div. 556

Harry Nicks

v.

State

Appeal from Jefferson Circuit Court

PATTERSON, JUDGE

Appellant, Harry Nicks, was indicted on March 25, 1983, in the Bessemer Division of the Jefferson County Circuit Court, for the capital offense of murder

committed during a robbery in the first degree, in violation of §13A-5-40(a)(2), Code of Alabama 1975. Omitting its formal parts, the indictment reads, as follows:

"The Grand Jury of said County, charges that before finding of this indictment Harry Nicks, whose name to the Grand Jury is otherwise unknown, on or about March 5, 1983, did intentionally cause the death of Robert Back, by shooting him with a pistol, and said Harry Nicks caused said death during the time that Harry Nicks was in the course of committing a theft of lawful money of the United States of America, of undetermined denominations, the property of Robert Back and Isadore Back, d/b/a Bessemer Pawn Shop, by the use of force against the person of Robert Back, with intent to overcome his physical resistance or physical power of resistance, while the said Harry Nicks was armed with a deadly weapon, to-wit: a pistol, in violation of §13A-5-40(a)(2) of the Code of Alabama, 1975"

At arraignment, Nicks pleaded not guilty and not guilty by reason of mental disease or defect. On May 25, 1984, a jury found him guilty of the capital offense charged in the indictment. A sentencing hearing was held before the jury in accordance with §§13A-5-43 through -46, Code of Alabama 1975, and the jury returned an advisory verdict recommending that the penalty be death. Ten jurors recommended the death penalty and two recommended a sentence of life imprisonment without the possibility of parole. Section 13A-5-46(f) requires that an advisory verdict recommending death be based on a vote of at least ten jurors. Thereafter, the trial court held another sentencing hearing, in accordance with §§13A-5-47 through -52 Code of Alabama 1975, and, after weighing the aggravating and mitigating circumstances and considering the jury's recommendation, sentenced Nicks to death.

This case arises out of an incident which occurred on March 5, 1983, in the Bessemer Pawn Shop at 315 N.

19th Street, Bessemer, Alabama. The pawn shop was owned and operated by Robert and Isadore Back. At approximately 2:30 p.m., a black male entered the shop. He was wearing a red vinyl jacket, blue jeans, and a clear plastic shower cap on his head. He had acne scars on the right side of his face. He was carrying a red canvas tote bag which had a white shoulder strap. Robert Back and an employee, Debra Lynn Love, were in the shop at the time. The man approached Back and said, "Man, I need some money. I got to get out of town quick." He then pulled a pistol from the tote bag, pointed it at Back, and told Love not to move. Back took money from a cash drawer and put it in the tote bag. The robber demanded more money. He demanded "big bucks," and continuously called Back a "god damned old man" and "mother fucking old man." He threatened to kill Back and pulled a second pistol from the bag. Back took money from a second cash drawer and put it in the bag. The robber demanded more money. He wanted "big bucks" and "big bills." He ordered Love to lie on the floor and she complied. Back opened the cash drawer in the safe and handed more money to the robber and told him, "This is all I have." The robber ordered Back to lie next to Love on the floor. As Back and Love lay face down on the floor, the robber fired three shots. One shot entered the back of Love's head; one entered the back of Back's head, penetrating his brain; and one went into a rubber mat on the floor. Back either died instantly or in a matter of minutes from the bullet wound to his head; however, the bullet fired into Love's head lodged in her skull and she survived. As soon as Love heard the robber leave the shop, she

telephoned the police, giving them a detailed description of the robber.

Subsequently, Love identified appellant, in two lineups conducted by the police, as the person who robbed the pawn shop and shot Back and her. She also made a positive in-court identification of appellant.

Venita Bishop was working as a cashier in a nearby store on the date of the incident. She observed a black male, fitting the description of the robber, in her store around 12:30 to 12:45 p.m. Subsequently, she identified appellant, in a lineup, as the person she observed in the store where she worked on the day of the incident. She also made a positive in-court identification of appellant.

A firearms expert determined that two of the bullets fired by the robber were .22 caliber and fired from the same gun. The two pistols displayed by the robber were never found. The autopsy performed on Back's body disclosed stippling, or powder burns, around the wound to the back of his head, indicating that the pistol from which the shot was fired was very close to his head, probably within two inches.

Appellant did not testify in his own behalf during the guilt phase of the trial. He called only two witnesses: Dr. Clifford B. Hardin, a psychiatrist, and Gordon Burkhead, his landlord, in support of his insanity plea.

Two issues are raised by appellant on appeal.

I

First, appellant contends that the prosecuting attorney's reference to him, in closing argument, as a "bad guy" or a "bad person" constituted reversible error.

During closing arguments the prosecuting attorney stated, as follows:

"Now, going on to the Seymour case a little bit, I think the judge is going to instruct you that the Seymour case doesn't have anything to do with the issue of his innocence or guilt as to the capital murder case at the pawn shop. They are two distinct crimes. The reason we introduced that was not to inflame the jury that he was a bad guy, even though that he is a bad person, I think the evidence proved he is guilty of that, too. There's no question about it."

Appellant claims in brief that "the prosecutor's reference to him as a 'bad person' was reversible error because this was an attempt by the State to prove bad character and the defendant had not attempted to show his good character." He relies on Cox v. State, 465 So.2d 1215 (Ala.Cr.App. 1985), and Jones v. State, 53 Ala.App. 690, 304 So.2d 34, cert. denied, 293 Ala. 761, 304 So.2d 38 (1974).

In considering this issue, as well as the following issue, it is necessary to discuss in some detail the Seymour case, referred to above by the prosecuting attorney, and particularly the part it played in the trial of this case.

The evidence introduced by the State in its case-in-chief showed that at about 12:30 p.m., on March 15, 1983, ten days after the robbery and shooting at the pawn shop, two black males entered a business known as W. B. Seymour Jewelry Company, which is one block from the pawn shop and on the same side of the street. The business was owned and operated by W. B. Seymour, who was ninety-five years of age. His daughter, Nell Russell, worked for him. She was sixty-nine. Both were present in the store on the occasion. One of the men entering the store was wearing a blue suit and the

other was wearing a long-billed cap, sun goggles, and a brown or tan coat or sweater. Both of the men were carrying pistols, and the one in the blue suit was carrying a beige tote bag. One of the men stated, "This is a robbery." The robber in the brown coat took the rings from Russell's hand, after striking her on the hand with a pistol. The robber in the blue suit "threw" the tote bag on the counter, and the other man put Russell's rings into it. The robber in the blue suit approached Seymour and took Seymour's money from his pockets and the money from the cash register. While this was going on, a customer came in the store, and the customer, Russell, and Seymour were herded to the back of the store by the robber in the blue suit. This robber ordered Russell to open the safe, but she told him it could not be opened until 6:00 p.m. He then ordered Russell, Seymour, and the customer to lie on the floor. They complied; however, Seymour had difficulty getting down because of his age, and the robber hit him in the head with the butt of his pistol. Seymour grabbed the doorknob of the door to the beauty shop next-door, and the robber struck him on the hand with the pistol. Russell testified that, as the robber in the blue suit was doing this, he told Seymour that "if he didn't lay down he was going to kill him like he did that man up the street." She also stated that the robber warned Seymour, "old man, I'm going to kill you, get down." The people in the beauty shop next-door began yelling, "Nell and Mr. Seymour is being robbed," and the robber in the blue suit, followed by the robber in the brown coat, ran out of the store. Russell also testified that the robber in the brown coat told her that "if I didn't do what he

said, they would do me like the man up the street."

The police received a report and description of a possible getaway car used by the robbers, and a search commenced. An automobile fitting the description was located in Birmingham and, as a result of this discovery, Guicy Horn was arrested. Ultimately, Horn admitted to participating in the Seymour Jewelry Company robbery and identified appellant as the other participant. Horn testified for the State at trial. His testimony generally coincided with the testimony given by Russell concerning the details of the robbery. He stated that appellant wore the blue suit and was the one that forced the victims to the back of the store and ordered them to lie down. He further testified that during the robbery, appellant told Seymour, "Well, don't make me kill you like I did the other one."

After appellant's arrest, his residence was searched, pursuant to a search warrant, and a beige tote bag containing watch parts taken in the jewelry store robbery and a blue suit were seized. Horn identified the tote bag as the one which was his and used in the robbery. He also identified the blue suit as the one worn by appellant during the robbery. Russell identified the watch parts as those taken in the robbery.

There is a multitude of reported cases concerning derogatory characterization of an accused by a prosecuting attorney in closing arguments. Examples of such cases can be found in Watson v. State, 266 Ala. 41, 44, 93 So.2d 750, 752 (1957); Barbee v. State, 395 So.2d 1128, 1134 (Ala.Cr.App. 1981); and the Alabama Digest. The general rule pertaining to such comments

is set out in 23A C.J.S. Criminal Law §1102 (1961), as follows:

"Comments by the prosecuting attorney which refer to, and make unfavorable inferences from, the conduct of accused in the course of the transaction for which he is on trial, or his conduct at any other time or place, or which refer to his character as shown by such conduct, or to his background, breeding, or associations, or to other details of his personal history or characteristics are proper, where the purported facts referred to by counsel are supported by competent evidence in the case, and where the inferences and deductions sought to be made from such facts are within the bounds of proper argument. On the other hand, remarks or argument of the prosecuting attorney concerning the character or conduct of accused, which is not supported by the record or which exceeds the limits of fair argument or inference is improper.

"In a proper case, the prosecuting attorney may characterize accused or his conduct in language which, although it consists of invective or opprobrious terms, accords with the evidence in the case, and, where the evidence warrants the belief that accused is guilty, the prosecutor may employ terms appropriate to the nature or degree of turpitude involved in the crime charged; but characterizations not justified by the evidence or the charge which the evidence tends to prove, and hence merely abusive, or which are couched in intemperate and inflammatory language are, ... improper." (Footnotes omitted.)

We also find in 23A C.J.S. Criminal Law §1106 (1961), the following:

"While the prosecuting attorney may characterize accused or his conduct by terms of opprobrium appropriate to the facts in evidence, it is improper for him to indulge in intemperate characterization, personal abuse, vituperation, or vilification of accused, tending solely to arouse or to inflame the passion and prejudice of the jury against him, even where such comments are to some extent supported by the evidence, and, a fortiori, where they are not." (Footnotes omitted.)

And, in 3 Wharton's Criminal Procedure §521 (C.Torcia 12th ed. 1975), it is stated, as follows:

"In his argument, counsel should enjoy the greatest latitude consistent with decorum and a sense of honor. A prosecutor's use of

strong or intemperate language does not constitute error unless it is unjustified and prejudicial to the defendant. Although the characterization of defendant as a 'criminal' or, in terms of the particular offense charged, as a 'murderer', is improper, the impropriety is not always so prejudicial as to warrant a reversal." (Footnotes omitted.)

A reading of a sampling of the many Alabama cases on this subject clearly establishes that Alabama courts apply and follow the general principles quoted above. For examples, see Watson v. State, supra; Waldrop v. State, 459 So.2d 953 (Ala.Cr.App. 1983), aff'd, 459 So.2d 959 (Ala. 1984), cert. denied, 471 U.S. 1030 (1985); Barbee v. State, supra; Liner v. State, 350 So.2d 760 (Ala.Cr.App. 1977); West v. State, 54 Ala.App. 647, 312 So.2d 45 (Ala.Cr.App.), cert. denied, 294 Ala. 775, 312 So.2d 52 (Ala. 1975); Braden v. State, 49 Ala.App. 97, 268 So.2d 877 (1972).

It is obvious that no fixed standard can be applied to prejudicial remarks made by counsel during the course of trial, and each case must be judged on its own merits. Smith v. State, 282 Ala. 268, 210 So.2d 826 (1968); Liner v. State, supra.

The comment of the prosecuting attorney complained of in the instant case ("The reason we introduced that [Seymour case] was not to inflame the jury that he was a bad guy, even though that he is a bad person, I think the evidence proved that he is guilty of that, too.") is unclear and, on analysis, subject to different interpretations. It could be argued that it is not a characterization of appellant as a "bad person" at all. There was no objection to the use of the term at the time, and the court did not raise the matter on its own. We believe that this indicates in this case that

appellant, defense counsel, and the court did not interpret the remark as a comment on appellant's character, but rather placed little significance or importance on the comment at the time. It does not appear that the remark, in the context in which it was made, was intended to be abusive, to inflame the passion of the jury, or to be a comment on appellant's character, and we do not believe that it was or had that effect or was considered as such by the jury. It obviously was not calculated to produce a wrongful conviction. We do not think that the characterization, if it can be called such, was especially likely to stick in the minds of the jurors and influence their deliberations. Assuming that this was a characterization of appellant as a "bad person," it was not unsupported by the evidence and, while perhaps improper, was not fundamental error requiring reversal. In a proper case, the prosecuting attorney may characterize the accused or his conduct in language which, although it consists of invective or opprobrious terms, accords with the evidence of the case. Waldrop v. State, supra; Barbee v. State, supra. We are not dealing here with a case where the evidence is slight; in fact, the evidence of guilt is strong and convincing. We do not believe that error was demonstrated in this particular case.

We have previously held that such a comment, as we are dealing with here, is not a statement of fact, but merely arguendo of the prosecutor's opinion, and is generally within the limits of allowable forensic discussion. Watson v. State, supra; Liner v. State, supra.

We note that the trial court firmly admonished the

jury, at the beginning of the trial and in its oral charge, that statements and arguments of the attorneys were not evidence in the case; that it was the sole judge of the facts; and that if the attorneys made a statement not supported by the evidence, the jury was to disregard it. Appellant made no objection to these instructions and did not ask for further instructions in reference to arguments of counsel. We believe that these instructions covered the alleged prejudicial argument. The statement complained of, if considered a characterization of appellant, was merely arguendo of the opinion of the prosecutor and, in light of the trial court's instructions, reversible error is not shown. West v. State, supra.

The cases upon which appellant relies can be clearly distinguished from the instant case. The case of Jones v. State, supra, did not involve arguments to the jury, but dealt with the admission of evidence. In a murder prosecution, the statement by the victim before she died, "Charles is mean", was admitted over the objection of the defendant as being a part of the res gestae. 53 Ala.App. at 694, 304 So.2d at 38. This court held that such testimony violated the principle that the character of a defendant in a criminal case is not subject to attack by the State until the defendant has shown, or attempted to show, good character, and its admission constituted reversible error. The jury heard the objectionable testimony, the objection of the defendant, and the ruling of the trial court that it was admissible. Thus, the testimony was clearly and forcefully brought to the attention of the jury and naturally was received by them as something they should

consider. This is far different from a casual remark which was made by a prosecutor in closing argument and apparently was considered to be too insignificant to object to at the time or simply went unnoticed.

The case of Cox v. State, supra, does involve closing argument by a prosecuting attorney and, at first blush, appears to be very close to the instant case; however, on closer examination, the case is clearly distinguishable. During final argument, the following occurred:

"MRS. SMITHERMAN: This is a bad boy in the community.

"MR. JOHNSON: Judge, I object to this. This is improper argument.

"THE COURT: I didn't hear it.

"MR. JOHNSON: I object. She said this is a bad boy in the community. There's been no evidence whatsoever of that.

"THE COURT: Overruled.

"MR. JOHNSON: That is improper argument.

"THE COURT: Overruled.

"MR. JOHNSON: We would ask for a mistrial.

"THE COURT: Overruled.

"MR. JOHNSON: We except.

"THE COURT: Go ahead.

"MRS. SMITHERMAN: Was his theory based on the evidence, ladies and gentlemen? This boy is a bad boy in the community.

"MR. JOHNSON: Judge, I renew my objection. She's made the same statement this is a bad boy.

"THE COURT: I've already overruled it. I overruled it again. Go ahead.

"MR. JOHNSON: We except again."

465 So.2d at 1216. Unlike the instant case, this comment specifically refers to the reputation and character of the defendant in the community. The

comment was repeated by the prosecutor and objection was made on each occasion. The trial court overruled the objections. Thus, the comment was clearly brought to the attention of the jury. This court reversed, holding that this was a direct attack upon the character of the defendant when the defendant had presented no evidence of his good character. The testimony in Jones and the comment in Cox, coupled with the manner in which they were presented to the jury, made it especially likely that the remarks pertaining to the defendants made an impression on the minds of the jurors and influenced their deliberations. Such is not the case here.

For the above reasons, we hold that the statement in the instant case was not so injurious as to deprive appellant of a fair trial. We find no reversible error here and, thus, no merit in this contention.

II

Appellant next contends that the trial court committed reversible error by admitting evidence of the Seymour Jewelry Company robbery - a crime which he allegedly committed, but was not charged with in the indictment. He moved by motion in limine prior to trial that the State be prohibited from using such evidence and objected to its introduction when it was presented at trial.

In C. Gamble, McElroy's Alabama Evidence §69.01(1) (3d ed. 1977), the general exclusionary rule preventing evidence of crimes not charged in the indictment is stated, as follows:

"On the trial of a person for the alleged commission of a particular crime, evidence of his doing another act, which itself is a crime, is not admissible if the only probative function of such evidence is

to show his bad character, inclination or propensity to commit the type of crime for which he is being tried. This is a general exclusionary rule which prevents the introduction of prior criminal acts for the sole purpose of suggesting that the accused is more likely to be guilty of the crime in question. This rule is generally applicable whether the other crime was committed before or after the one for which the defendant is presently being tried.

"This exclusionary rule is simply an application of the character rule which forbids the state to prove the accused's bad character by particular deeds. The basis for the rule lies in the belief that the prejudicial effect of prior crimes will far outweigh any probative value that might be gained from them. Most agree that such evidence of prior crimes has almost an irreversible impact upon the minds of the jurors.

"The foregoing exclusionary rule does not work to exclude evidence of all prior crimes, only such as are offered to show the defendant's bad character. If the defendant's commission of another crime or misdeed is an element of guilt, or tends to prove his guilt otherwise than as tending to prove guilt via bad character, then proof of such other act is admissible.

"In their mental struggles to determine whether evidence of the accused's commission of another crime is admissible, for a purpose other than as tending to show guilt via bad character, the appellate courts in numerous opinions have set forth a list of the various purposes for which evidence of the accused's commission of another crime is admissible. ...

"An interesting question that should be recognized at this point is whether the list of purposes for which prior crimes of the accused can be introduced is fixed. The better reasoned view would appear to be that set forth by Mr. Justice McElroy in the second edition: 'However, it must not be considered that such a listing of admissible purposes was intended to be exhaustive. It must ever be borne in mind that the state may prove the accused's commission of another crime if such other crime is relevant for any purpose other than that of showing his guilt through the medium of bad character.'" (Emphasis added, footnotes omitted.)

See also Brewer v. State, 440 So.2d 1155 (Ala.Cr.App.), cert. denied, 440 So.2d 1155 (1983); Minnifield v. State, 397 So.2d 189 (Ala.Cr.App.), cert.

denied, 397 So.2d 195 (Ala. 1981).

Under Alabama law, evidence of any offense other than that specifically charged is prima facie inadmissible. Allen v. State, 380 So.2d 313 (Ala.Cr.App. 1979), cert. denied, 380 So.2d 341 (Ala. 1980), cert. denied, 449 U.S. 842 (1980). However, Alabama law provides for the admissibility of evidence of collateral crimes or acts as part of the prosecution's case-in-chief if the defendant's collateral misconduct is relevant to show his guilt other than by suggesting that he is more likely to be guilty because of his past misdeeds. Brewer v. State, supra. Numerous Alabama cases list the exceptions to the general exclusionary rule, or tests for relevancy, whereby evidence of collateral crimes or acts may be admitted. These exceptions include the following:

"(1) Relevancy to prove physical capacity, skill, or means to commit the now-charged crime; (2) part of the res gestae or part of a continuous transaction; (3) relevancy to prove scienter or guilty knowledge; (4) relevancy to prove criminal intent; (5) relevancy to prove plan, design, scheme, or system; (6) relevancy to prove motive; (7) relevancy to prove identity; (8) relevancy to rebut special defenses; and (9) relevancy in various particular crimes."

Nelson v. State, [Ms. 6 Div. 892, November 12, 1986] ____ So.2d ____, ____ (Ala.Cr.App. 1986). See also Twilley v. State, 472 So.2d 1130 (Ala.Cr.App. 1985); Brewer v. State, supra; Miller v. State, 405 So.2d 41 (Ala.Cr.App. 1981); Thompson v. State, 374 So.2d 377 (Ala.Cr.App. 1978), aff'd, 374 So.2d 388 (Ala. 1979); McMurtrey v. State, 37 Ala.App. 656, 74 So.2d 528 (1954); Wilkins v. State, 29 Ala.App. 349, 197 So. 75, cert. denied, 240 Ala. 52, 197 So. 81 (1940); McElroy's §§69.01(1)-(11); Schroeder, Evidentiary Use

Ala.L.Rev. 241 (1984). All of the exceptions relate to the relevancy of the evidence, which means that evidence of separate and distinct crimes is admissible only when the evidence is relevant to the crime charged. Mason v. State, 259 Ala. 438, 66 So.2d 557 (1953); Noble v. State, 253 Ala. 519, 45 So.2d 857 (1950).

"All evidence is relevant which throws, or tends to throw, any light upon the guilt or the innocence of the prisoner. And relevant evidence which is introduced to prove any material fact ought not to be rejected merely because it proves, or tends to prove, that at some other time or at the same time the accused has been guilty of some other separate, independent and dissimilar crime. The general rule is well settled that all evidence must be relevant. If evidence is relevant upon the general issue of guilt, or innocence, no valid reason exists for its rejection merely because it may prove, or may tend to prove, that the accused committed some other crime, or may establish some collateral and unrelated fact. Evidence of other acts to be available must have some logical connection and reveal evidence of knowledge, design, plan, scheme, or conspiracy of the crime charged; or circumstantial evidence of identity of the person charged with the crime; or tends to corroborate direct evidence admitted."

Underhill, Criminal Evidence §154 (3d ed. 1923). If the evidence is not so remote as to lose its relevancy, the decision to allow or not allow evidence of collateral crimes or acts as part of the State's case-in-chief rests in the sound discretion of the trial judge. McGhee v. State, 333 So.2d 865 (Ala.Cr.App. 1976); McDonald v. State, 57 Ala.App. 529, 329 So.2d 583 (1975), writ quashed, 295 Ala. 410, 329 So.2d 596 (1976), cert. denied, 429 U.S. 834 (1976).

The theory of appellant's defense, other than insanity, was mistaken identity, i.e., he did not

commit the crime charged because he was not there. Appellant's counsel stated this in his opening and closing arguments. The defense offered no evidence to support this alibi and/or mistaken identity theory; however, counsel vigorously cross-examined the State's witnesses on the identity issue in an effort to shake and discredit the identification of appellant as the perpetrator of the crime charged. He sharply questioned Love about her opportunity to observe the robber during the commission of the crime and the differences between her initial description of the robber, given to police, and the accused's actual appearance and age. He attacked the credibility of Love's lineup identification, as well as the photographic lineups. He elicited the testimony that Love had selected a picture from the photographic spread as a person that looked like the robber, and that it was a photograph of a person other than appellant. He further elicited the testimony that Love obtained a warrant at the suggestion of the police for the arrest of this person, accusing him of the crime, when it was learned that the person might leave town. He questioned Love's ability to make an accurate identification due to the surgery she had had as a result of the wound and due to the fact that she was under the treatment of a psychiatrist for the problems which arose after the incident. He also attacked her ability to make an in-court identification. He cross-examined Bishop, in reference to her identification of the robber, and highlighted the differences between her description and that of Love's. He also focused on the four artists' drawings of the suspect and the comparison of them with appellant's actual appearance

and with each other. He strongly argued these points of discrepancy to the jury. He did everything he could to cast doubt upon appellant's identity as that of the robber.

Moreover, appellant's counsel stated in his closing argument to the jury, the following:

"The whole issue in this case boils down to one thing, the identification that [Love] made of Harry Nicks as the man that was in that store that day. ... He's not guilty because he wasn't there. Folks, it just boils down to who are you going to believe? Are you going to believe Debra Love or believe us? We say we didn't do it."

Indeed, as appellant contends, this is the issue upon which this case turns.

The prosecuting attorney stated in final argument that evidence of the Seymour Jewelry Company robbery was offered as evidence of identity of appellant as the robber in the charged crime. Appellant's counsel stated his position to the jury, in reference to the evidence of the Seymour case, as follows:

"The judge is going to instruct you, ladies and gentlemen, that that evidence came in ... only for the purpose to identify this man as the one involved in the pawn shop and for no other purpose. They're asking you -- You know the ulterior purpose behind that is to get you ladies and gentlemen to convict a man of a crime that [he] is now charged with for saying he did another crime that he is not before you on trial. Hasn't been convicted of it. Hasn't been tried by a jury like you individuals. They want you to convict him for what he supposedly did at W. B. Seymour Jewelry Store."

The trial court instructed the jury in its oral charge on how the jury should treat this evidence, as follows:

"During the course of this trial, ladies and gentlemen, evidence has been presented to you of the defendant's involvement in a subsequent offense, other than the one for which he is charged with in this indictment. And I instruct you that the evidence was

introduced, or was allowed, for the limited purpose of showing scheme, plan, method of operation, and the identity of the defendant, and for that purpose only. This evidence is admitted for your consideration in regard to the defendant's guilt or innocence of the offense for which he is charged. It is not admitted for showing bad character of the defendant or his inclination or propensity to commit the type of crimes for which he is being tried."

From these instructions, it is clear that the trial court admitted the evidence of the Seymour Jewelry Company robbery under the plan, design, scheme or system, and identity exceptions to the general exclusionary rule which we have referred to above. Evidence of the accused's commission of another crime is admissible if such evidence, considered with other evidence in the case, warrants a finding that both the now-charged crime and such other crime were committed in keeping with or pursuant to a single plan, design, scheme, or system, whether narrow or broad in scope. McElroy's §69.01(6). The identity exception contemplates the situation where the now-charged crime was committed in a novel and peculiar manner and the State is allowed to show that the accused has committed other similar offenses, in the same novel and peculiar manner, in order to show him to be the perpetrator of the now-charged crime. McElroy's §69.01(8).

In the instant case, there are certain similarities in the charged crime and the subsequent robbery. The crimes were committed within the same block in the middle of the day and only ten days apart. While one business was a pawn shop and one a jewelry store, they were similar in their structure, manner of doing business, and number and kind of employees present on the premises. The owners were elderly men and each had a woman employee. In each case, a tote

bag was used to hold the proceeds of the robbery, and the victims were threatened with a pistol and made to lie on the floor. In each case, the owner was referred to as "old man" by the robber.

Admittedly, there are differences between the two crimes, the most obvious of which is the disposition of the respective victims. Moreover, only one robber was involved in the charged crime, and two were involved in the other crime. Different clothing was worn by the robbers, and a different color tote bag was used. However, appellant was positively identified by an eyewitness as the robber in the charged crime, and positively identified by his accomplice as one of the robbers in the other crime and, in addition, his statement that if Seymour did not lie down he would kill him like he did the man up the street, linked him directly with the crime charged. The similarities in the manner, location, and circumstances of the two crimes, coupled with the eyewitness identification of appellant as being involved in both and his admission connecting him with the charged crime, support a logical inference that appellant was the perpetrator of the charged crime. How can it be said that the actions of the person who participated with Horn in the Seymour Jewelry Company robbery in the manner and under the circumstances outlined above did not, with reason and in common knowledge and experience, point strongly toward appellant as being the person who committed the offense charged in the indictment? These considerations certainly provoke a conclusion that the evidence admitted pertaining to the subsequent crime was clearly relevant.

If the evidence of a collateral crime clearly falls within one of the exceptions to the general exclusionary rule, it should be admitted as having probative value on the issue of guilt other than as tending merely to show the accused's bad character. If there is a close question of whether the crime falls into one of these exceptions, admissibility is within the discretion of the trial court. Whitley v. State, 37 Ala.App. 107, 64 So.2d 135 (1953); McElroy's 69.02(1). In examining the issue of whether the evidence of the Seymour Jewelry Company robbery was admissible under the plan, design, scheme, or system exception or the identity exception, we find it unnecessary to make such a determination, for the evidence was clearly admissible for another reason.

In the instant case, the statement of appellant to Seymour during the Seymour Jewelry Company robbery that "if he didn't lay down he was going to kill him like he did that man up the street" constituted an admission which implicated him in the Bessemer Pawn Shop robbery and, thus, was admissible because it tended to prove his guilt of the pawn shop robbery and murder otherwise than as tending to prove guilt via bad character. It was obvious that the statement referred to the murder of the pawn shop owner, Back, and appellant does not contend otherwise. The general rule in this state relative to an accused is that the acts, declarations, and conduct of the accused, against interest, are always competent evidence. Pope v. State, 65 So.2d 369 (Ala.Cr.App. 1978); Dockery v. State, 269 Ala. 564, 114 So.2d 394 (1959); Blackwell v. State, 264 Ala. 553, 88 So.2d 347 (1956). Any conduct or declaration of an accused having a relation to the offense charged,

indicating a consciousness of guilt, is admissible as evidence against him. Conley v. State, 354 So.2d 1172 (Ala.Cr.App. 1977).

In Dockery v. State, supra, the Alabama Supreme Court addressed an issue very similar to the one before us. In Dockery, the trial court allowed the admission of testimony in the defendant's murder trial to the effect that the defendant, during an apparent holdup or assault which was committed shortly after the murder, stated the following to the victim: "Don't move, you son-of-a-bitch. I will kill you like I did the man in Alabama." Dockery contended that the evidence of the subsequent, collateral, offense was inadmissible, for it was evidence of a separate and distinct offense. The supreme court held that the statement was admissible under the rule that the accused's acts, declarations, and conduct against interest are competent, citing Blackwell v. State, supra. The court held, "Evidence which is relevant to establish some element of the offense, or material as to some issue in the case, is not rendered inadmissible by the fact that it also tends to show another offense committed by defendant." 269 Ala. at 568, 114 So.2d at 397 (quoting Snead v. State, 243 Ala. 23, 24, 8 So.2d 269, 270 (1942)). This rule is sometimes stated to the effect that, if such evidence is admissible on general grounds, it is not rendered inadmissible by the fact that it discloses offenses other than the one with which the defendant is charged; that the test of admissibility is the connection of the facts proven with the offense charged; and that, where such evidence

is relevant and tends to prove the defendant's guilt, he cannot by multiplying his crimes diminish the volume of competent evidence against him. Thomas v. State, 132 Fla. 78, 181 So. 337 (1938); People v. Hall, 308 Ill. 198, 139 N.E. 123 (1923). See State v. Martin, 49 Utah 346, 164 P. 500 (1917), for a similar case where the defendant implicated himself in both the charged and collateral crimes by letters he had written. See also Ringstaff v. Commonwealth, 275 S.W.2d 946 (Ky. 1955). Further, in discussing the admission of details concerning a collateral offense, the court held that proof of the circumstances attending the narration of an inculpatory statement or confession which establish the voluntary nature of such statement is admissible, and in specifically addressing the situation before it, the Dockery court noted that the statements of Dockery would hardly have made sense without the explanation of the circumstances under which they were uttered. See also Drake v. State, 257 Ala. 205, 57 So.2d 817 (1952); Tillison v. State, 248 Ala. 199, 27 So.2d 43 (1946).

In another similar case, People v. Glab, 15 Cal.App.2d 120, 59 P.2d 195 (1936), a prosecution of a wife for the murder of her husband, testimony as to the wife's participation in a brawl subsequent to the killing wherein she drew a gun and threatened to kill, stating that she had already killed one man, was held admissible as an admission to the previous killing and proved possession of a gun, notwithstanding the tendency of the testimony to prejudice the wife in the minds of the jurors. The court held, "The fact that incidentally such testimony may have involved facts as to the commission of another crime, or may have had a tendency to prejudice the accused in the minds of

jurors, is no valid objection to its admission where, as here, the testimony was proper as tending to connect the accused with the crime charged." 15 Cal.App.2d at 124, 59 P.2d at 197-98.

As we have discussed above, appellant's identity as the perpetrator of the charged crime was very much in issue. The admission made during the commission of the collateral crime was relevant and competent evidence to corroborate Love's testimony and her identification of appellant and to directly prove him guilty of the offense for which he was being prosecuted. Where evidence relating to other offenses has a natural tendency to corroborate or supplement admitted direct evidence, an exception is made to the general rule excluding evidence of other offenses. Schwartz v. United States, 160 F.2d 718 (9th Cir. 1947); Hass v. United States, 31 F.2d 13 (9th Cir. 1929), cert. denied, 279 U.S. 865 (1929); Annot., 42 A.L.R.2d 854 (1955). The evidence of the collateral crime was not offered nor admitted for the purpose of showing appellant's bad character.

In readily finding that the testimony of appellant's admission was properly admitted for the jury's consideration, we further hold that the details surrounding this admission which were admitted into evidence were, although prejudicial to appellant's defense, also properly admitted. The nature of appellant's admission required that it be put in the context in which it was stated. The robbery of the jewelry store was in-progress when the inculpatory admission was made. Thus, it would have been difficult for the jury to consider the import of appellant's admission and to give it the proper weight without

having, for its consideration, a substantial amount of the evidence concerning the jewelry store robbery itself. In addition, some details of the circumstances of appellant's giving of the admission were relevant to insure to the jury the voluntariness of the admission. See Dockery, supra. Moreover, the details of the subsequent crime were relevant for yet another reason: A comparison of those details with the details of the charged crime presented similarities between the two crimes which were highly pertinent to the jury's consideration of the inferences of appellant's admission, i.e., whether he was referring, in his admission, to the charged crime.

Finally, the admitted details of the jewelry store robbery were properly allowed into evidence to corroborate Horn's testimony of appellant's admission. During cross-examination, appellant's counsel vigorously attacked the credibility of Horn's testimony and accused him of lying. Counsel argued to the jury that Horn's testimony was improbable and unbelievable. For example, he brought out discrepancies in Horn's description of the blue suit which Horn said appellant was wearing at the time of the jewelry store robbery. He highlighted evidence that Horn had made four statements to the police and that his first statement had been false. Horn admitted that in his first statement he had named a fictitious person, a Byron Wallace, as his accomplice and that other portions of his first statement were false. Horn admitted on cross-examination that he suspected appellant of the robbery of the pawn shop and the murder of Back and that he and his wife had discussed getting a reward. He testified that he took to appellant a copy of the

local newspaper containing a story about the robbery-murder and endeavored to get appellant to discuss the crime so that he could obtain information which would enable him to turn appellant in for the reward. He stated that he had heard the reward was from \$10,000 to \$40,000. Horn further testified that he had pled guilty to the Seymour Jewelry Company robbery and had received a sentence of ten years. In holding that the evidence of the circumstances of the jewelry store robbery were relevant to corroborate Horn's testimony, we note that specifically the evidence seized in appellant's house connected appellant with the Seymour Jewelry Company robbery and corroborated Horn's testimony. This evidence was relevant in aiding the jury in its determination of the weight and credibility to be given Horn's testimony, particularly his testimony in reference to appellant's admission. Horn's testimony tended to corroborate the testimony of Russell and, in turn, the testimony of Russell, even though she could not identify appellant, likewise tended to corroborate Horn's testimony. As we have stated, Horn's and Russell's testimony had the natural tendency to supplement and corroborate the testimony of Love and Bishop.

In holding that the trial court's admission of the details as well as appellant's admission was not error, we do not believe that the injection of the collateral crime diverted the jury's attention from the charge being tried and the issues involved therein. There was no mini-trial or trial within a trial of the collateral crime. Moreover, the court's instructions were sufficient to apprise the jury of its responsibilities.

Finally, we find that the prejudicial effect of the evidence of the collateral crime did not outweigh its probative value. Thus, we find no error in the trial court's admission of the testimony concerning the Seymour Jewelry Company robbery.

As noted, the trial judge, in his charge to the jury, instructed that appellant was not charged with the jewelry store robbery, and that the testimony tending to sustain such a charge could be considered by the jury only insofar as it might show a scheme, plan, or method of operation, or aid it in determining the identification of the person who, if any person, they might find from the evidence had committed the robbery-murder as charged in the indictment. While we have held that the evidence of the collateral crime was admissible for a reason other than that obviously contemplated by the trial court, we do not believe that the trial court's limiting instructions prejudiced appellant. A trial court will not be placed in error for assigning the wrong reason for a proper ruling, if that ruling is correct for any reason. Bighames v. State, 440 So.2d 1231 (Ala.Cr.App. 1983); Harnage v. State, 290 Ala. 142, 274 So.2d 352 (1972). By citing this rule, we do not imply that we think the evidence of the other crime was not admissible under the exceptions to the exclusionary rule referred to by the trial court in its oral charge; we simply choose not to address that issue. Rather, we prefer to bottom our decision on the admissibility of the evidence on the ground stated. The court's instructions were not conflicting, contradictory, or inconsistent. We find no prejudice in the court's instructions in this case.

III

As previously noted, appellant entered a plea of not guilty by reason of insanity along with a not guilty plea. He called only two witnesses during the guilt phase of the trial, and they were called in an effort to support his insanity plea. Due to the emphasis appellant placed on this aspect of his defense during trial and the requirement that we search the record for plain error, we have carefully reviewed the record in this regard, even though no issue is made of appellant's mental condition in his brief and argument on appeal.

Appellant called a psychiatrist, Dr. Clifford B. Hardin. Appellant had been examined prior to trial by a commission of three psychiatrists, one of whom was Dr. Hardin. Dr. Hardin testified that in his opinion, at the time of the alleged offense, appellant was not so affected with a mental disease, defect, or derangement that his ability to appreciate the criminality of his conduct could have been substantially impaired, or that appellant would have been prevented from conforming his conduct to the requirements of the law. This was the view of the commission. The testimony of Dr. Hardin did reflect that appellant had suffered from some type of mental illness in the past. The trial court found that even though there was evidence that appellant had suffered from mental disease or defect in the past, the evidence reflected that at the time of the commission of the offense, appellant had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. We concur in this finding. Appellant completely failed to establish a

lack of criminal responsibility. Shorts v. State, 412 So.2d 830 (Ala.Cr.App. 1981); Ala. Code §13A-3-1(1975).

IV

The scope of our review in death cases is set out in A.R.A.P. 45A, as follows:

"In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the appellant."

We have examined the instant record for any plain error, whether or not brought to our attention or the attention of the trial court. We have found no "plain error or defect in the proceedings," either in the guilt phase or in the sentencing phase of the trial.

We have also followed the requirements of Beck v. State, 396 So.2d 645 (Ala. 1980). Beck, requires the following three-tiered analysis in death cases: (1) Whether the crime was punishable by death; (2) Whether similar crimes are being punished capitally throughout the State; and (3) Whether the death sentence is appropriate in relation to the defendant. In reviewing appellant's death sentence by this three-tiered analysis, we make the following findings: First, Nicks was convicted of murder during a robbery in the first degree, in violation of §13A-5-40(a)(2), Code of Alabama 1975. The offense is by statutory definition a capital offense. Second, we take judicial notice that similar crimes are being punished capitally throughout Alabama. See, e.g., Thomas v. State, 460 So.2d 207 (Ala.Cr.App. 1983), aff'd, 460 So.2d 216 (Ala. 1984); Waldrop v. State, 459

So.2d 953 (Ala.Cr.App. 1983), aff'd, 459 So.2d 959 (Ala. 1984), cert. denied, 471 U.S. 1030 (1985); Weeks v. State, 456 So.2d 395 (Ala.Cr.App. 1983), aff'd, 456 So.2d 404 (Ala. 1984), cert. denied, 471 U.S. 1030 (1985); Luke v. State, 444 So.2d 393 (Ala.Cr.App.), aff'd, 444 So.2d 400 (Ala. 1983), cert. denied, 466 U.S. 993 (1984); Womack v. State, 435 So.2d 766 (Ala. 1983), cert. denied, 464 U.S. 986 (1983); Coulter v. State, 438 So.2d 336 (Ala.Cr.App. 1982), aff'd, 438 So.2d 352 (Ala. 1983); Bush v. State, 431 So.2d 555 (Ala.Cr.App. 1982), aff'd, 431 So.2d 563 (Ala. 1983). See also Beck v. State, 396 So.2d 645, n. 5 (Ala. 1981) (opinion after remand, as modified on denial of rehearing); Colquitt, The Death Penalty Laws of Alabama, 33 Ala.L.Rev. 213, 225 (1982). Two-thirds of the death sentences imposed in Alabama are in cases of robbery-murder. Thomas v. State, 460 So.2d at 225. In regard to the third determination, Beck requires us to examine the penalty imposed upon the defendant in relation to that imposed upon his accomplice, if any. We note that there were no accomplices or co-defendants in the instant case. Finally, our independent weighing of the aggravating and mitigating circumstances convinces us that the sentence of death is appropriate in relation to this defendant.

After appellant was convicted of the capital offense charged, a separate sentence hearing was held before the jury in accordance with §13A-5-46. After hearing evidence concerning aggravating and mitigating circumstances; after being properly instructed by the trial court as to the applicable law; and after being correctly advised as to its function in reference to

the finding of aggravating and mitigating circumstances, if any, the weighing of same, if appropriate, and its responsibility in reference to the return of an advisory verdict; the jury returned the following verdict: "We the jury recommend to the trial court that the penalty be death." Ten of the jurors voted to recommend the death penalty and two voted to recommend life imprisonment without the possibility of parole.

Thereafter, the trial court held another hearing, in accordance with §13A-5-47, to aid it in determining whether or not it would sentence appellant to death as recommended by the jury or to life imprisonment without the possibility of parole. The trial court ordered and received a written pre-sentence investigation report as required. Upon conclusion of the hearing, the trial court entered specific written findings concerning the existence or non-existence of each aggravating circumstance enumerated in §13A-5-49, each mitigating circumstance enumerated in §13A-5-51 and §13A-5-52, as well as written findings of fact summarizing the crime and appellant's participation in it. In its findings of fact (see "Appendix" attached hereto and made a part of this opinion), the trial court found the existence of the following aggravating circumstances: Appellant was previously convicted of a felony involving the use or threat of violence to the person, and the capital offense for which appellant stands convicted was committed while he was engaged in the commission of a robbery. (This latter aggravating circumstance is encompassed within the capital offense alleged in the indictment.) Ala. Code §§13A-5-49(2); -49(4); and

-40(a)(2) (1975). The trial court found from the evidence the following:

"On March 5, 1983 at approximately 2:30 P.M. the defendant, Harry Nicks, entered the Bessemer Pawn Shop, 315 No. 19th Street, Bessemer, Alabama. At that time the business was being operated by Robert Back, a co-owner and Debra Love his employee. Upon entering the business the defendant presented a pistol, demanded the money from Mr. Back and told Ms. Love not to move. Mr. Back gave the defendant the money from the cash drawer. When the defendant demanded more money, Mr. Back complied and gave him money from the safe. Nicks then ordered Mr. Back and Ms. Love to lie down on the floor. With both victims lying helplessly on the floor, Harry Nicks intentionally shot both in the head with a pistol. Mr. Back died as a result of his wounds and Ms. Love was seriously injured."

The trial court examined the evidence for mitigating circumstances pursuant to the requirements of §§13A-5-51 and -52, and found that no mitigating circumstances existed.

Thus, the trial court found the existence of two aggravating circumstances and no mitigating circumstances. It weighed the aggravating circumstances, while noting the absence of mitigating circumstances, and, finding the aggravating circumstances sufficient to support the sentence of death recommended by the jury, sentenced appellant to death.

We find that the findings and conclusions of the trial court are strongly supported by the evidence. We concur in the verdict of the jury and the findings of the trial court that death is the appropriate sentence in this case. Nicks deliberately executed Back and attempted to execute Love in an obvious effort to prevent his identification and prosecution for the robbery he had committed.

We also review appellant's sentence by the provisions of §13A-5-53, Code of Alabama 1975. Our findings above fully comply with §13A-5-53(a). In compliance with §13A-5-53(b), we find the following: (1) There is no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) based on our independent weighing of the aggravating and mitigating circumstances, the sentence of death is appropriate in this case; and (3) considering the crime committed and the defendant, the death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases.

We have carefully searched the record in both the guilt and sentence phases of appellant's trial, and we have found no error. Accordingly, appellant's conviction and sentence of death are due to be, and they are hereby, affirmed.

AFFIRMED.

BOWEN, J., TAYLOR, J., and McMILLAN, J. CONCUR;
TYSON, J. CONCURS SPECIALLY.

Footnotes

¹ The trial court's sentencing order setting out written findings as to aggravating and mitigating circumstances, and written findings of facts summarizing the crime and appellant's participation in it is attached hereto, made a part of this opinion, and marked "Appendix".

² A listing of convictions for which a sentence of death was imposed under Alabama's death penalty statute. In Beck the Alabama Supreme Court noted that, of the fifty cases it studied, thirty-three were robbery-intentional killing cases.

VS
HARRY NICKS

84 AUG 2 PM 1 17
COUNTY T TH JUDICIAL CIRCUIT
BESSEMER DIVISION
CASE NO. CC 83-350
CIRCUIT CLERK & REC.
BESSEMER DIVISION
FINDING OF FACTS

In accordance with Section 13-A-5-47(d) Alabama Criminal Code, the Court makes the following findings of facts summarizing this crime and the defendant's participation in it and specific findings as to the existence or non-existence of aggravating and mitigating circumstances:

On March 5, 1983 at approximately 2:30 P. M. the defendant, Harry Nicks, entered the Bessemer Pawn Shop, 315 No. 19th Street, Bessemer, Alabama. At that time the business was being operated by Robert Back, a co-owner and Debra Love his employee. Upon entering the business the defendant presented a pistol, demanded the money from Mr. Back and told Ms. Love not to move. Mr. Back gave the defendant the money from the cash drawer. When the defendant demanded more money, Mr. Back complied and gave him money from the safe. Nicks then ordered Mr. Back and Ms. Love to lie down on the floor. With both victims lying helplessly on the floor, Harry Nicks intentionally shot both in the head with a pistol. Mr. Back died as a result of his wounds and Ms. Love was seriously injured.

The Court makes the following findings concerning the existence or non-existence of the aggravating factors enumerated in Section 13A-5-49:

13A-5-49 (1) The defendant was not under sentence of imprisonment.

(2) The defendant was previously convicted of another felony involving the use of threat of violence to the person in that he was previously convicted of assaulting a person and putting in jeopardy the life of a person by the use of a dangerous weapon (T. 18, U.S.C., Sec. 2113(d)).

(3) The capital offense was not committed under circumstances creating a great risk of death to many persons.

(4) The capital offense was committed with the defendant was engaged in the commission of robbery.

(5) The capital offense was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(6) The capital offense was not committed for pecuniary gain.

(7) The capital offense was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital offense was not especially heinous, atrocious or cruel compared to other capital offenses.

The Court makes the following findings concerning the existence or non-existence of the mitigating factors enumerated in Section 13A-5-51 or any additional mitigating circumstances offered pursuant to Section 13A-5-52:

13A-5-51 (1) The defendant does have a significant history of prior criminal activity.

(2) The capital offense was not committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) The victim was not a participant in the defendant's conduct nor did he consent to it.

(4) The defendant was the principal and sole perpetrator of this capital offense.

(5) The defendant did not act under extreme duress nor was he under the substantial domination of another person.

(6) While the evidence in this case reflects that the defendant has suffered from mental disease and/or defect in the past, the evidence further reflects that at the time of the commission of this offense the capacity of the defendant to appreciate the criminality of his to the requirements of law was not substantially impaired.

(7) The age of the defendant at the time of the crime was 32 years old and is not a mitigating factor.

13A-5-52 Upon consideration of the evidence the Court does not find any un-enumerated mitigating circumstances.

The Court finds two aggravating circumstances to exist and finds no mitigating circumstances. The Court finds that the aggravating circumstances and the jury recommendation that the defendant be sentenced to death outweighs the mitigating circumstances. In making this evaluation the Court did not merely tally and numerically compare these factors but used this process to marshal and organize these factors relevant to sentencing. After consideration of all these factors, it is the finding of the Court that the proper sentence in this case is death.

The defendant is adjudged guilty of the capital offense and being asked if he had anything to say why the judgment of the Court and sentence of the law should not be pronounced upon says, "I know one thing, I am not guilty. I didn't commit no kind of act".

It is the judgment of the Court and the sentence of the law that the defendant, Harry Nicks, suffer death by electrocution on the 10th day of October, 1984 and the Sheriff of Jefferson County, Alabama is directed to deliver the defendant to the custody of the Department of Corrections and Institutions at Montgomery, Alabama and the designated executioner shall, at the proper place for the execution of one sentenced to suffer death by electrocution cause a current of electricity of sufficient intensity to cause death and the application and continuance of such current to pass through the body of the defendant, Harry Nicks, until he is dead.

DONE and ORDERED this the 2nd day of August, 1984.


SENIOR CIRCUIT JUDGE

Tyson, J. concurring specially

At first blush I confess to certain misgivings with reference to the evidence of the Seymour Jewelry Company robbery which was admitted at trial of this appellant as evidence of the appellant's identity in the "charged crime".

There is considerable discussion in the majority opinion under Issue II and cases cited to support the admission of this evidence both as evidence of identity and, also, evidence admitted with reference to the pursuit of a plan, design, scheme or system. All of this is fully discussed in the majority opinion.

I find in reviewing the authorities cited in the majority opinion which support this position that, in addition thereto, this court has admitted such evidence as an exception to the general rule of Mason v. State, 259 Ala. 438, 66 So.2d 557 (1953) (42 A.L.R. 2d 847) in homicide cases to establish motive and intent.

Two such cases are Hardy v. State, 51 Ala.App. 489, 286 So.2d 899 (1973) and Bynum v. State, 348 So.2d 804 (Ala.Crim.App. 1976), cert. quashed, 348 So.2d 828 (Ala. 1977).

Based on my review of the cases herein cited and in the majority opinion, I am of the opinion that the trial court correctly admitted the evidence with reference to the comment alleged to have been made by this appellant in the Seymour Jewelry Company robbery.

I, therefore, join in the affirmance in this cause.

Supreme Court of the United States

No.

A-760

HARRY NICKS,

Applicant,

v.

ALABAMA

**ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI**

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for writ of
certiorari in the above-entitled cause be, and the same is hereby, extended
to and including May 12, 1988.

s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 4th

day of April, 1988.

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ORIGINAL

No. 87-6977

Supreme Court, U.S.
FILED

JUN 13 1988

JOSEPH F. SPANIO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

HARRY NICKS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

RECEIVED

JUN 15 1988

**OFFICE OF THE CLERK
SUPREME COURT, U.S.**

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION
TO CERTIORARI

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL

WILLIAM D. LITTLE
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GENERAL

COUNSEL OF RECORD

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Montgomery, Alabama 36130
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QUESTIONS PRESENTED FOR REVIEW

- I. SHOULD THIS COURT GRANT CERTIORARI WHERE NONE OF THE ISSUES PRESENTED WERE RAISED OR DECIDED BELOW?
- II. SHOULD THIS COURT GRANT CERTIORARI AS TO THE ISSUE REGARDING THE USE OF EVIDENCE OF AN UNADJUDICATED CRIME IN A CAPITAL SENTENCE PROCEEDING WHERE THAT ISSUE DOES NOT EXIST IN THIS CASE?
- III. SHOULD THIS COURT GRANT CERTIORARI TO CONSIDER THE ISSUE REGARDING PROSECUTORIAL ARGUMENT AS TO THE JURY'S ADVISORY SENTENCE VERDICT WHERE PETITIONER'S ARGUMENT IS BASED ON INACCURATE STATEMENTS OF LAW AND FACT.

PARTIES

The caption contains the names of all parties in the Court below.

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OPINIONS BELOW

Petitioner's conviction and sentence were affirmed by the Court of Criminal Appeals of Alabama. Nicks v. State, 521 So.2d 1018 (Ala.Cr.App. 1987). The decision of the Court of Criminal Appeals was affirmed by the Supreme Court of Alabama. Ex parte Nicks, 521 So.2d 1035 (Ala. 1988).

JURISDICTION

The Court has no jurisdiction in this case because none of the questions presented were raised in the court below.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

United States Constitution, Amendment XIV
(in pertinent part)

... No state shall ... deprive any person of life, liberty, or property, without due process of law; ...

STATUTORY PROVISIONS INVOLVED

Code of Alabama 1975, §13A-5-40(a)(2)

(a) The following are capital offenses:

...

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

Code of Alabama 1975, §13A-5-47(e)

(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

Code of Alabama 1975, §13A-5-49(2)

(2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;

Code of Alabama 1975, §13A-5-51(1)

(1) The defendant has no significant history of prior criminal activity;

STATEMENT OF THE CASE

A. Statement of the Facts

On March 5, 1983, petitioner shot and killed Robert Back during a robbery of a pawn shop owned by Back in Bessemer, Alabama. Nicks v. State, 521 So.2d at 1020-1021.

B. Proceedings Below

Petitioner was indicted on March 25, 1983, by the Grand Jury of Jefferson County, Alabama, for the capital offense of murder during the course of a robbery in the first degree in violation of Code of Alabama 1975, §13A-5-40(a)(2). Nicks v. State, supra. Petitioner was tried for and convicted of this offense in May 1984. At a separate sentence proceeding the jury recommended that petitioner be sentenced to death. Id. The trial court, after an independent weighing of the aggravating and mitigating circumstances, accepted the recommendation and sentenced petitioner to death. Id.

Petitioner's conviction and sentence were affirmed by the Court of Criminal Appeals of Alabama on January 27, 1987. Id. A petition for writ of certiorari was granted as a matter of right by the Supreme Court of Alabama, which on February 12, 1988, affirmed the decision of the Court of Criminal Appeals. Ex parte Nicks, 521 So.2d 1035 (Ala. 1988).

ARGUMENT

- I. THIS COURT HAS NO JURISDICTION AS TO EITHER OF THE ISSUES PRESENTED BECAUSE THEY WERE NOT RAISED OR DECIDED BELOW.

Petitioner here raises two issues, one regarding alleged reference to an unadjudicated crime at the sentence phase and the other regarding alleged comment by the prosecutor on the advisory nature of the jury's sentence verdict. The Court should not grant certiorari as to either of these issues because they were not properly raised at trial or on appeal.

Petitioner claims that the matter of the unadjudicated crime was raised at trial by means of his motion in limine (petition, pp. 4-5). This is incorrect. Alabama law is clear that an adverse ruling on a motion in limine does not preserve the issue for review, and that an objection must be made at the time the evidence is actually offered. Odum v. Schofield, 480 So.2d 1217, 1218 (Ala. 1985). This was not done at the time the alleged arguments based on the unadjudicated crime were supposedly made at the sentence phase (R. 732, 774).¹ There was thus no proper objection to this matter at trial.

On appeal the Court of Criminal Appeals did discuss at length the admissibility of the evidence of the collateral crime at the guilt phase; however, no issue was made of any alleged reference to this crime at the penalty phase. Nicks v. State, 521 So.2d at 1025-1031. Nor was the issue now presented discussed by the Alabama Supreme Court. Ex parte Nicks, 521 So.2d 1035 (Ala. 1988).

Regarding the other issue, involving allegedly improper comment on the advisory nature of the jury's sentence verdict, this also was not objected to at trial. Nor was the issue raised or decided on appeal. Nicks v. State, supra, affirmed, Ex parte Nicks, supra.

¹Under argument II respondent takes the position that there were in fact no arguments made at the penalty phase based on this collateral crime.

With regard to the second issue petitioner argues that a statement by the Court of Criminal Appeals regarding "plain error," applicable in Alabama capital cases under Rule 45A, A.R.A.P., constituted appellate review of this issue, and essentially any and all other conceivable issues, even though they were not raised at trial or on appeal. The Eleventh Circuit has recently rejected a similar argument in the federal habeas corpus context, that Alabama's plain error rule opens up for habeas review any claim even if not directly raised before any state court. Julius v. Johnson, 840 F.2d 1533, 1545-1547 (11th Cir. 1988). This is consistent with this Court's decision in United States v. Frady, 456 U.S. 152, 162-165 (1982), that the plain error rule of Rule 52(b), F.R.Cr.P., does not act as a waiver of procedural default for purposes of review under 28 U.S.C. §2255. Julius also follows traditional notions of comity, under which federal courts should not review issues which the state courts have been given no fair opportunity to decide. Consideration of petitioner's claim regarding alleged comment on the nature of the jury's sentence verdict would serve to encourage defense attorneys to "sandbag" by withholding arguments until federal court review could be obtained.

This Court has no jurisdiction to decide issues not raised in the court below. Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945). Because neither of the two issues presented here was raised at trial or on appeal, the Court should deny certiorari.

II. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE REGARDING THE USE OF EVIDENCE OF AN UNADJUDICATED COLLATERAL CRIME IN A CAPITAL SENTENCE PROCEEDING BECAUSE, CONTRARY TO PETITIONER'S ARGUMENT, THAT ISSUE DOES NOT EXIST IN THIS CASE.

Petitioner asks this Court to grant certiorari to consider whether the use of evidence of an unadjudicated collateral crime at a capital sentence proceeding is unconstitutional. The Court should deny certiorari because that issue does not exist in this case.

In the guilt phase of petitioner's trial the trial court allowed into evidence testimony of another robbery committed by petitioner ten days after and one block away from the crime for which he was charged. The state's theory was that this evidence tended to establish the identity of petitioner as the perpetrator of the charged crime. On appeal the Alabama Court of Criminal Appeals upheld the trial court's decision on two different grounds. First, the Court of Criminal Appeals held that the similarities in the crimes did tend to establish that the perpetrator of one also committed the other. 521 So.2d at 1025-1031. Second, petitioner's statement to his victim in the second robbery that if he (the victim) did not lay down he (petitioner) would kill him like he "did the man up the street" constituted an admission. Id.

In contrast, therefore, to the cases cited by petitioner regarding an alleged split among various jurisdictions on the admission of evidence of unadjudicated collateral crimes at the sentence stage, the evidence of other criminal activity was used in this case at the guilt phase for the narrow purpose of establishing identity.

Moreover, Alabama law specifically prohibits the use of unadjudicated collateral crimes in capital sentencing. Aggravating circumstances under current Alabama law are limited to those provided under Code of Alabama 1975, §13A-5-49. The only aggravating circumstance under this section to which the defendant's prior criminal activity is relevant is that under §13A-5-49(2), which provides as follows:

- (2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;

(emphasis added). A conviction is specifically required to establish this aggravating circumstance. Regarding mitigating circumstances, Code of Alabama 1975, §13A-5-51(1), provides as a mitigating circumstance that

- (1) The defendant has no significant history of prior criminal activity;

The Supreme Court of Alabama has held that only convictions can be considered to disprove the existence of this mitigating circumstance, Cook v. State, 369 So.2d 1251, 1257 (Ala. 1978).² Petitioner thus has no complaint with current Alabama law regarding the admission of unadjudicated collateral crimes at the sentence stage.

Petitioner attempts, nonetheless, to shoehorn his case into the category of cases where such convictions were used at sentencing by claiming that the prosecutor utilized the collateral crime in his case in argument at the sentence stage. This is not supported by the record. Petitioner cites two portions of argument as the basis for his claim. The first is apparently the following:

We are not going to introduce a whole lot of evidence during the sentencing phase of the trial. You have already heard all the evidence of the trial itself.

(R. 732) (A copy of this page of the record is attached as part of the appendix). This is, of course, only a general reference to the guilt stage evidence as a whole and does not draw attention in any way to the collateral crime.

The second portion of argument came during the course of the state's argument for the existence of a particular aggravating circumstance, that petitioner has previously been convicted of another capital offense or a felony involving the use or threat of violence to the person. The prosecutor had stated earlier that in proving this aggravating circumstance the state would be relying only on a certified copy of a federal bank robbery conviction (R. 734-735). The prosecutor then argued as follows:

²Cook was decided under Alabama's previous capital murder statute, Code of Alabama 1975, §13-11-1 et seq., repealed in 1981, whereas petitioner was convicted and sentenced under the successor statute, Code of Alabama 1975, §13A-5-39 et. seq. Both statutes, however, provide this mitigating circumstance in identical language, so the holding of Cook is unquestionably applicable to cases under both statutes.

I think we have proved beyond any reasonable doubt, this certified copy, which has been marked for identification as state's Exhibit S-1, and introduced in evidence, that prior to this pawn shop murder-robbery, and, then, the Seymour Jewelry robbery, this man, Harry Nicks, committed the crime of bank robbery while he was armed with a deadly weapon or dangerous instrument, as defined in the code section.

(R. 774) (A copy of this page of the record is attached as part of the appendix). While the prosecutor did mention the unadjudicated robbery, the Seymour Jewelry robbery, he was arguing for the existence of the aggravating circumstance based only on the bank robbery conviction. This is consistent with the language of Code of Alabama 1975, §13A-5-49(2), set out above, which requires the previous conviction of a felony involving the use or threat of violence to the person to establish this aggravating circumstance.

As has been shown above, the prosecution used the evidence of the unadjudicated crime only at the guilt stage, and did not attempt, consistent with Alabama law, to use it at sentencing to prove an aggravating circumstance or negate a mitigating circumstance. This case thus does not fall within the category of cases into which petitioner attempts to place it. Accordingly, this Court should deny certiorari as to this issue.

III. THE COURT SHOULD DECLINE TO CONSIDER THE ISSUE REGARDING PROSECUTORIAL ARGUMENT AS TO THE JURY'S ADVISORY SENTENCE VERDICT BECAUSE PETITIONER'S ARGUMENT IS BASED ON INACCURATE STATEMENTS OF LAW AND FACT.

Petitioner urges this Court to grant certiorari because, he claims, the lower courts are split as to whether correct statements to the jury regarding the advisory nature of its sentence verdict violate the doctrine of Caldwell v. Mississippi, 472 U.S. 320 (1985). Petitioner also claims that the prosecutor in the instant case misled the jury as to its sentencing role. Both of these assertions are incorrect.

According to petitioner, some states hold that arguments or instructions informing the jury that its verdict is advisory or a recommendation violates Caldwell only if the statements are legally inaccurate, whereas the Eleventh Circuit has decided

that such statements are unconstitutional regardless of their correctness. Respondent submits that this is erroneous. In Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified in unrelated part on rehearing, Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), cert. granted, Dugger v. Adams, ___ U.S. ___, 108 S.Ct. 1106 (March 7, 1988), the Eleventh Circuit has made clear that Caldwell applies only where the jury is misled as to its sentence responsibility. Under Adams there is no error where the relative roles of the trial court and the jury are correctly explained.

Petitioner's contention that the jury was misled in his case is based on the use of the word "opinion" by the prosecutor in his argument. Whatever the merits of this purely semantic argument, it ignores the prosecutor's description at other points of the jury's decision as an "advisory verdict" (R. 732, 738-740). Petitioner himself argues that the word "verdict"

carries great weight and responsibility in criminal proceedings and conveys to jurors an appropriate obligation to diligently deliberate and speak the truth.

(petition, p. 13). Petitioner thus cannot argue that the prosecutor sought to diminish the jury's sense of responsibility in its sentence decision.

For the above reasons the Court should deny the petition as to the issue of the jury's allegedly reduced sense of responsibility in sentencing.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL
By-

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CERTIFICATE OF SERVICE

I, William D. Little, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of the foregoing Brief and Argument on the attorney for petitioner by placing said copy in the United States Postal Service, first class postage prepaid and properly addressed as follows:

Hon. Bryan A. Stevenson
185 Walton Street
Atlanta, Georgia 30303

Done this 13th day of June, 1988.

William D. Little
WILLIAM D. LITTLE
COUNSEL FOR RESPONDENT

0308v

Jerry D. Murray
Official Court Reporter
Bessemer Courthouse
Bessemer, Alabama

1 After the opening statements are made,
2 then we will offer evidence. Evidence
3 will be offered. I will instruct you
4 what the law is and you will be allowed
5 to return an advisory verdict.

6 At this time we will have the
7 opening statements. Mr. Meadows.

8 OPENING STATEMENT BY MR. MEADOWS:

9 Ladies and gentlemen, I'm going to keep my
10 remarks brief at this point. You have already crossed
11 the hurdle of the guilt finding phase and have deter-
12 mined this defendznt is guilty of the capital charge as
13 was stated.

14 At this point, as the judge said, it is up to you
15 to render an advisory verdict as to whether he be sen-
16 tenced to death by electrocution or whether he will be
17 given life without parole.

18 And just as you had instructions to aid you in
19 determining what legal principles you should apply in
20 determining this guilt or innocence along with the
21 facts, at this time there is also legal principles that
22 will aid you in determining whether the appropriate
23 punishment should be death by electrocution or life
24 without parole as you apply that to these same facts.

25 We are not going to introduce a whole lot of evi-
26 dence during the sentencing phase of the trial. You
27 have already heard all the evidence of the trial itself.
28 And this is the primary thing you should consider, in

Jerry D. Murray
Official Court Reporter
Bessemer Courthouse
Bessemer, Alabama

1 would have to consider aggravating circumstances and
2 mitigating circumstances.

3 I think we have proved beyond any reasonable
4 doubt, this certified copy, which has been marked for
5 identification as State's Exhibit S-1, and introduced
6 in evidence, that prior to this pawn shop murder-
7 robbery, and, then, the Seymour Jewelry robbery, this
8 man, Harry Nicks, comitted the crime of bank robbery
9 while he was armed with a deadly weapon or dangerous
10 instrument, as defined in the code section.

11 There is nowhere on this document that would say
12 a bank robbery only. This 2113(d) that the judge read
13 to you out of the Code is where that bank robbery came
14 from. That is what he referred to.

15 But, more importantly, aside from this prior bank
16 robbery conviction, the main thing you need to consider
17 is the facts and circumstances surrounding the actual
18 pawn shop thing, the murder and the robbery of Mr.
19 Robert Back. I can't emphasize that too much. It was
20 just a cold-blooded execution. Harry Nicks has the
21 benefit of a nice Courtroom, and 12 jurors to sit and
22 listen to his side of the story and listen to the State
23 present its case against him this week before making
24 any determination as to what should be done. He did
25 not give Mr. Back that opportunity. Twelve people did
26 not have the opportunity to sit and decide whether Mr.
27 Back should ever die.

28 Mr. Harry Nicks made that decision himself. At

SUPREME COURT OF THE UNITED STATES

HARRY NICKS *v.* ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF ALABAMA

No. 87-6977. Decided June 30, 1988

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins,
dissenting from denial of certiorari.

I continue to believe that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see *Gregg v. Georgia*, 428 U. S. 153, 231-241 (1976) (MARSHALL, J., dissenting). But even if I did not hold this view, I would grant the petition for writ of certiorari and vacate the death sentence in this case, because the sentence was secured in flagrant violation of our decision in *Caldwell v. Mississippi*, 472 U. S. 320 (1985).

In *Caldwell* we vacated a sentence of death because the prosecutor "sought to minimize the jury's sense of the importance of its role" by stressing to the jury that its verdict would be subject to appellate review. *Id.*, at 325. The prosecutor told the jury during the sentencing phase that "your decision is not the final decision. . . . Your job is reviewable." *Ibid.* We held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.*, at 328-329.

Petitioner's sentence of death cannot be squared with our decision in *Caldwell*. The prosecutor in this case made the following argument to the jury at the penalty phase of petitioner's trial:

The opinion, which you will come to a conclusion when you go back and deliberate—Let me say this, it will be only an advisory opinion. The law provides for you to present this to the Court for their consideration. The ultimate decisions [sic] rests with Judge Reynolds. He will be the one to take whatever ruling that you send out and decide whether it will be life without parole or death by electrocution in the electric chair.

Pet. for Cert 3. This argument, perhaps even more baldly than the statements in *Caldwell*, sought to minimize the jury's sense of its awesome responsibility to determine whether petitioner would live or die by encouraging the jury to view its verdict as merely "advisory." This shifting of the jury's sense of responsibility to another decisionmaker, as we explained at length in *Caldwell*, undermines the reliability of the jury's decision and conditions the jury to return the death penalty. See *id.*, at 330–333.

That the prosecutor in this case told the jury that the trial judge would make the ultimate decision, whereas the prosecutor in *Caldwell* identified the appellate court as the ultimate decisionmaker, is a distinction without a difference. *Caldwell* makes plain that a death penalty cannot stand where the jury is led to believe that the defendant's life rests in some other hands. The constitutional infirmity here is thus no different from that in *Caldwell*, and the sentence of death no less intolerable. I therefore would grant the petition and reverse the judgment of the Supreme Court of Alabama to the extent it sustains the imposition of the death penalty.